INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions	1
Statute or treaty	2
Date of judgment and date of application for appeal	2
Nature of the case	2
Grounds upon which it is contended that the questions involved are substantial	3
Appendix—Opinion of the United States District Court	10

Table of Cases Cited

Ashland Coal and Ice Co. v. *United States*, 325 U. S. 840	6
Bourjois v. *Chapman*, 301 U. S. 183	6
Brady v. *United States*, 283 U. S. 804	6
El Dorado Oil Works v. *United States*, 328 U. S. 12	2, 6, 7
George Allison and Company v. *United States*, 296 U. S. 546	6
Great Lakes Steel Corp. v. *United States*, 81 Fed. Supp. 450	3
Interstate Commerce Commission v. *Hoboken Manufacturers Railroad Co.*, 320 U. S. 368	2
Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227 U. S. 88	6
Lockerty v. *Phillips*, 319 U. S. 182	6
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	6
Procter & Gamble Company v. *United States*, 225 U. S. 282	7
Reconstruction Finance Corp. v. *Bankers Trust Company*, 318 U. S. 163	6
Rochester Telephone Corporation v. *United States*, 307 U. S. 125	3, 6, 7

Page

Standard Oil Company v. *United States*, 283 U. S. 235 3
Stark v. *Wickard*, 321 U. S. 288 6
Yackus v. *United States*, 321 U. S. 414 6

STATUTES CITED

Administrative Procedure Act of June 11, 1946 (5 U.S.C.A. 1001-1011; 60 Statutes at Large 237, et seq.) 2
Interstate Commerce Act, Section 9 (49 U.S.C.A. 9) . 2
Judicial Code, Section 238 (28 U.S.C.A. 345) 1
Urgent Deficiencies Act of October 22, 1913 (38 Statutes at Large 220); 28 U.S.C.A., 47, 47(a) and 48 . 1, 2

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UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE EASTERN DISTRICT
OF MICHIGAN, SOUTHERN DIVISION

GREAT LAKES STEEL CORPORATION, A DELAWARE CORPORATION,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee;

INTERSTATE COMMERCE COMMISSION, ET AL.,

Intervening Defendants-Appellees

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States (1939), Great Lakes Steel Corporation, plaintiff and appellant in the above entitled cause, files this statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment entered in this court and cause December 22, 1948, dismissing this suit for want of jurisdiction.

(a) Statutory Provisions

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment here complained of is conferred by the following statutes: The Urgent Deficiencies Act of October 22, 1913 (38 Statutes at Large 220; 28 U.S.C.A. 47, 47(a) and 48) and Section 238 of the Judicial Code (28 U.S.C.A. Section 345).

Cases sustaining the jurisdiction of the Supreme Court on appeal are *Interstate Commerce Commission* v. *Hoboken Manufacturers Railroad Co.*, 320 U. S. 368, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12.

(b) Statute or Treaty

This suit does not involve the validity of a statute of a state or of a statute or treaty of the United States.

(c) Date of Judgment

The judgment sought to be reviewed was entered in this Court on December 22, 1948. Application for this appeal is being presented February 18, 1949.

Nature of the Case

This suit was brought under the Urgent Deficiencies Act of October 22, 1913 (28 U.S.C.A. 44, *et seq.;* 38 Statutes at Large 220, *et seq.*) as amended, and under the Administrative Procedure Act of June 11, 1946 (5 U.S.C.A. 1001-1011; 60 Statutes at Large 237, *et seq.*) to review an order of the Interstate Commerce Commission dismissing on the merits a Complaint filed by plaintiff-appellant pursuant to the provisions of Section 9 of the Interstate Commerce Act (49 U.S.C.A. Section 9).

The Complaint asked that the Commission determine that certain tariffs of the Pennsylvania Railroad Company, Erie Railroad Company and Baltimore and Ohio Railroad Company were applicable to shipments made by plaintiff and to order a refund of freight charges paid by plaintiff in excess of those payable under such tariffs. Complaint was filed in this court January 13, 1947, against defendant-appellee, United States of America.

The Interstate Commerce Commission and the three railroads intervened. The United States and the intervening defendants filed answers denying that plaintiff was entitled

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to relief on the merits. By their answers intervening defendants also challenged the jurisdiction of the court. On the trial of the case the only evidence offered was the record and testimony before the Commission.

The three judge court ordered the complaint dismissed for lack of jurisdiction. A copy of the court's opinion is attached hereto. It is reported in 81 Fed. Supp. 450 (Adv. Sheet).

Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The District Court's opinion that review under the Urgent Deficiencies Act may not be had of an order of the Interstate Commerce Commission denying reparation in a proceeding filed under Section 9 of the Interstate Commerce Act is based on a line of cases commencing with *Standard Oil Company* v. *United States*, 283 U. S. 235. Plaintiff contends that the District Court misinterpreted the holding of the Supreme Court in these cases; but if the District Court did not misinterpret these cases, then plaintiff contends that these cases have been wrongly decided by the Supreme Court.

Relief was denied in *Standard Oil Company* v. *United States* on three grounds:

1. On the negative order doctrine.

2. On the doctrine of administrative finality.

3. On the ground of attempting to pursue both of the alternative remedies provided in Section 9 of the Interstate Commerce Act.

So far as the first ground is concerned, *Standard Oil Company* v. *United States* has been overruled by this court in *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125. The second ground is not involved in this case because plaintiff herein challenged the decision of the Commission

as being arbitrary and without supporting evidence and asked only that the Commission's order be set aside and the matter remanded to the Commission for further proceedings not inconsistent with the Court's determination. It is on the third ground that the District Court in this proceeding held that *Standard Oil Company* v. *United States* was controlling. This overlooks, however, the difference between the relief sought in this case and relief sought in *Standard Oil Company* v. *United States*. In this case the relief sought was that the court:

> "1. Set aside, annul and suspend the said order of the Interstate Commerce Commission entered May 28, 1946 (Exhibit "E").
>
> "2. Remand the cause to the Interstate Commerce Commission, commanding the said Commission to take such further proceeding in said cause as may not be inconsistent with the court's determination.
>
> "3. Grant to the plaintiff such other and further relief as to the court shall seem proper."

The relief sought in the *Standard Oil Company* case was the entry of a decree "granting the prayer of said complaint (filed with the Commission) and finding that petitioner has been overcharged by an amount which is equal to the difference between the rates assessed by defendant carriers and the rates lawfully applicable to said petitioner's shipments, and ordering a further hearing if necessary, for the purpose of determining the amount of money to be paid by the defendant carriers to petitioner by way of reparation."

In deciding this phase of the case, the Supreme Court was careful to point out that its decision was reached "having regard to the remedy invoked and the relief sought by the petition," and without plaintiff having claimed that the Commission acted arbitrarily or without evidence. Plaintiff contends that the decision of the Supreme Court in

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Standard Oil Company v. *United States* on this phase of the jurisdictional question was nothing more than a holding that the court may not under the Urgent Deficiencies Act try the case *de novo*, and, after reaching its own conclusion on the facts, enter a decree for payment of reparation. If this is what the court meant in *Standard Oil Company* v. *United States*, the opinion of the court in that case was correct but it does not support the opinion of the District Court in this case.

If, however, the opinion of the Supreme Court in *Standard Oil Company* v. *United States* was intended to mean that review may not be had in any case of an order of the Commission denying reparation because it is an attempt to exercise both of the alternative remedies provided for in Section 9 of the Interstate Commerce Act, plaintiff contends that *Standard Oil Company* v. *United States* was erroneously decided and should be overruled on this ground as it was overruled on the negative order doctrine in *Rochester Telephone Corporation* v. *United States*. Plaintiff's contention in this respect is based on the following:

1. Section 9 of the Interstate Commerce Act is not susceptible of the construction that review of an order of the Interstate Commerce Commission denying reparation is an attempt to exercise both of the alternative remedies provided for in Section 9 of the Interstate Commerce Act and, therefore, prohibited by the Act, where the review sought is limited to having a determination by the court that the finding of the Commission is contrary to law, is unsupported by substantial competent evidence and is arbitrary and the relief sought is the setting aside of the Commission's order and remanding the matter to the Commission for further action.

2. If Section 9 of the Interstate Commerce Act is susceptible of the construction set forth in paragraph 1 above, the

court should reject such construction as not correctly expressing the intention of Congress in adopting the Act.

3. If Section 9 of the Interstate Commerce Act is susceptible of such construction but is also susceptible of a construction which would permit review of an order of the Commission, the court should construe the Act so as to permit rather than preclude review since the court is bound as between two constructions, one which would render the Act constitutional and one which would render it unconstitutional, to adopt the one which would render the Act constitutional (*Lockerty* v. *Phillips*, 319 U. S. 182). And to deny review of an order of an administrative tribunal which has acted arbitrarily or without sufficient evidence or contrary to law is a deprivation of property without due process of law contrary to the Fifth Amendment to the Constitution. (*Stark* v. *Wickard*, 321 U. S. 288; *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1; *Bourjois* v. *Chapman*, 301 U. S. 183; *Yackus* v. *United States*, 321 U. S. 414; *Reconstruction Finance Corporation* v. *Bankers Trust Company*, 318 U. S. 163 and *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88.)

It is also plaintiff's contention that if *Standard Oil Company* v. *United States* held that a review may not be had of an order of the Interstate Commerce Commission denying an award of damages, *Standard Oil Company* v. *United States* has been overruled by *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125 and *El Dorado Oil Works* v. *United States*, 328 U. S. 12. Plaintiff contends the same thing with respect to the other cases relied on by the District Court: *Brady* v. *United States*, 283 U. S. 804; *George Allison and Company* v. *United States*, 296 U. S. 546; *Ashland Coal and Ice Company* v. *United States*, 325 U. S. 840. If these cases have been correctly interpreted by

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the lower court, then they were wrongly decided and they have been overruled, the first two by *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125 and all of them by *El Dorado Oil Works* v. *United States*, 328 U. S. 12.

From the time of the decision in *Procter & Gamble Company* v. *United States*, 225 U. S. 282 in 1912 until the decision in *Rochester Telephone Corporation* v. *United States* in 1939, carriers and the Interstate Commerce Commission were able to avoid a court test of a decision of the Commission denying reparation to a shipper by claiming the benefit of the negative order doctrine. When this doctrine was repudiated in *Rochester Telephone Corporation* v. *United States* it was thought that the language of Mr. Justice Frankfurter was sufficiently explicit and emphatic to restore to shippers the protection of which they had so long been deprived. This apparently is not the case for we find the Commission and the railroads still asserting that a decision of the Commission denying reparation may not be reviewed and, basing their contention on what we believe to be an erroneous construction of a case already overruled by the Supreme Court on the negative order doctrine but which, if the construction of the opinion contended for by the Commission and the railroads is correct, could not have been directly overruled by the court in *Rochester Telephone Corporation* v. *United States* because Section 9 of the Interstate Commerce Act was not therein involved.

If the order of the Interstate Commerce Commission may not be attacked on the ground that it was made without substantial evidence to support it, then, as was said in *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, "the Commission had a power possessed by no other official, administrative body or tribunal under our Government." Plaintiff contends Congress did not have any such intention in enacting Section 9 of the Interstate Commerce Act and that to adopt such a

construction of the Act would render the Act unconstitutional.

On the merits of the case itself, the ultimate question for decision by the Commission was whether or not certain transit tariffs were applicable to shipments involved. If the transit tariffs were applicable, plaintiff is entitled to a refund of freight charges paid in excess of those payable under said tariffs. Plaintiff shipped certain light structural steel into its plant at Mansfield, Ohio, where plaintiff performed on it certain fabrication operations, pursuant to contracts between plaintiff and the United States Navy, and the fabricated articles were then shipped to various points on the sea coast for further shipment overseas. Title to the fabricated articles passed to the Government on shipment from Mansfield and shipment from Mansfield was made on Government bills of lading. It was conceded that if the shipments from Mansfield had been made by plaintiff on ordinary commercial bills of lading, plaintiff would have been entitled to the benefit of the transit privilege. The Commission held that control over the shipments was lost by plaintiff and the continuity of the shipments was broken at Mansfield because the Navy Department, as shipper, had elected to make the shipments from that point as new and independent shipments.

Plaintiff contends that there was no substantial competent evidence:

(a) That the Government was the shipper;

(b) That the Government elected to make new or independent shipments from Mansfield;

(c) That plaintiff lost control over the shipments at Mansfield; or

(d) That plaintiff had failed to comply in any respect with any of the conditions of the transit tariffs.

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On the contrary, plaintiff contends that the evidence affirmatively established exactly the opposite. Plaintiff further contends that regardless of the correctness of the Commission's findings of fact, the shipments were governed by the transit tariffs and plaintiff is entitled to a refund of the difference between the freight charges paid and the charges computed under the transit tariffs. To establish the correctness of plaintiff's position will require a detailed examination of the testimony taken before the Commission and the tariffs in question.

It is a matter of utmost importance to shippers that there be restored to them the rights which Congress intended they should have, but apparently such restoration can come only from the Supreme Court. To many shippers, resort to the Supreme Court is impossible because of the expense involved. This case, however, is of sufficient importance to warrant the expense and the attention of the court, since the claim for reparation before the Commission is for an amount in excess of $500,000.00.

February 18, 1949.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 6295

GREAT LAKES STEEL CORPORATION, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, BALTIMORE & OHIO RAILROAD COMPANY, ET AL., *Defendants*

Opinion

Before: Simons, Circuit Judge, and Lederle and Picard, District Judges

LEDERLE, J.:

This is an action by which plaintiff, Great Lakes Steel Corporation, seeks to obtain reparations of some half a million dollars from three railroads. The amount claimed represents the difference between commercial freight rates which the railroads required plaintiff to pay for steel and iron shipments and the allocable portion of a lesser through rate which plaintiff claims should have been charged under what it claims were the applicable transit tariffs. It is conceded that if the special transit tariffs do not apply, freight was properly computed in accordance with other higher-rated tariffs.

The litigation originated by plaintiff filing a complaint for reparations before the Interstate Commerce Commission against the Baltimore and Ohio Railroad Company, the Erie Railroad Company, and the Pennsylvania Railroad Company, as defendants, bearing docket number 29,165. The report and order of the Commission denied plaintiff's right to reparations, holding the shipments were not covered by transit tariffs but by the other tariffs under which the railroads had computed the freight. From such ruling, plaintiff filed this appeal in this court under the Urgent

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Deficiences Act, *28 U.S.C.A. 41(8) (28), 45, 46 and 47.* The Interstate Commerce Commission and the three railroads intervened.

At a pre-trial hearing held June 3, 1948, the entire records before the Commission were received as exhibits, to constitute the complete record before this court. The case was heard by a three-judge District Court, constituted as required by the Revised Judicial Code, *28 U.S.C.A. 2321,* et seq. All defendants resisted plaintiff's claims on the merits, and several of them raised a jurisdictional question, asking that the complaint be dismissed for lack of jurisdiction. The court being of the opinion that this latter point is well taken, only a brief reference will be made to the underlying facts.

A transit tariff is one designed to permit stopping a shipment of material in transit for the performance of fabrication, manufacture or other work upon the material before re-shipping to ultimate destination. If the operation comes within the terms of the tariff, the complete transportation is regarded as one continuous movement, and, except for a slight transit charge, the freight is computed on the through rate from point of origin to point of ultimate destination.

During World War II, plaintiff owned a steel manufacturing plant at Mansfield, Ohio, to which it shipped iron and steel in carload lots over defendants' roads from origin points in Michigan, New York and Rhode Island. The iron and steel were unloaded, taken into the Mansfield plant and fabricated by plaintiff into Quonset huts in unassembled condition. These unassembled huts were then packed for overseas war shipment and sold to the United States Government f.o.b. Mansfield. From Mansfield, they were shipped by rail on Government bills of lading, at Government rates and expense, to ocean ports for shipment overseas. The Commission held that under these circumstances the continuity of each shipment was broken at Mansfield, where plaintiff lost control of the goods, the reshipment was a separate and independent transaction, and that, accordingly, the transit tariff did not apply for lack of continuity, and that plaintiff properly had been charged the

straight rates from point of origin to Mansfield under other applicable tariffs rather than the allocable portion of through rates from point of origin to ultimate destination.

The interstate transportation of property by railroads operating as common carriers is covered by the Interstate Commerce Act. Section 6 (7) of this Act, being *49 U.S.C.A. 6 (7)*, provides, among other things, that no such carrier may transport property without first publishing rate tariffs covering such transportation, and, further, that no carrier shall charge a greater or less or different compensation for such transportation than the rate specified in the applicable tariff. Section 8, being *49 U.S.C.A. 8*, provides that any carrier violating the Act shall be liable in damages to the person injured thereby. Section 9, which is *49 U.S.C.A. 9*, grants civil remedies to any such injured person, with a provision that any person so damaged may either complain to the Commission or bring suit in a United States District Court for recovery of the damages, but shall not have the right to pursue both such remedies, and must in each case elect which one of the two methods of procedure he will adopt. As interpreted by a line of cases of which *Ashland Coal & Ice Co. v. U. S.*, 325 U. S. 840, is the latest, these sections preclude resort to a District Court, including review under the Urgent Deficiencies Act, after a Commission decision refusing reparations. The theory is that the injured party has exercised the statutory election for seeking reparations by proceeding before the Commission, with its concomitant exclusion of right to resort to the District Court. Plaintiff seeks to escape the impact of the *Ashland Coal* decision in a number of ways.

Plaintiff argues that, in deciding the *Ashland* case, the District Court first held that there was no jurisdiction because it was a reparation case in which the shipper had exercised his Section 9 option by resorting to the Commission which precluded appeal to the District Court, and, second, the court then went on arguendo to state that if it had jurisdiction it would sustain the Commission's denial of reparations on the merits. Plaintiff then states that the Supreme Court affirmed the case without opinion, and such affirmance can be, and should be, interpreted as affirming on the

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merits only, without affirming the decision of lack of jurisdiction, because of some statements made six years previously in the unrelated case of *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125. Suffice it to say that we do not subscribe to the theory that, in affirming a judgment of lack of jurisdiction, wherein the trial court also made a dictum statement as to its opinion on the merits, such affirmance, without expressly saying so, either approves the dictum or disapproves the ratio decindeni. Not only do we disagree with plaintiff's deduction, but we believe its premise is factually incorrect as to there being no indication of basis for the affirmance. The Supreme Court affirmed by per curiam memorandum opinion, 325 U. S. 840, reading as follows:

> "The motions to affirm are granted and the judgment is affirmed. Standard Oil Co. *v.* U. S., 283 U. S. 235, *240-41*; George Allison & Co. *v.* U. S., 296 U. S. 546. Dissenting: Mr. Justice Black and Mr. Justice Douglas." (Italics added.)

Pages *240-41* of the *Standard Oil* case, specifically referred to as authority, are devoted to exposition of the doctrine of election of remedies by first proceeding for reparations before the Commission, which defeats the subsequent jurisdiction of the District Court on appeal or by original action. The *George Allison* case, also cited as authority, was itself a per curiam memorandum opinion, and the official report thereof appearing in 296 U. S. 546, indicates that therein the Supreme Court considered only the jurisdictional issue. It reads:

> "*Jurisdictional statement submitted November 2, 1935.* Decided November 11, 1935. Per Curiam: The decree is affirmed. Standard Oil Co. *v.* U. S., 283 U. S. 235, *241*, Brady *v.* U. S., 283 U. S. 804." (Italics added.)

Considering first, the *George Allison* judgment thus affirmed was based solely upon lack of jurisdiction, second, the italicized statement that the jurisdictional statement was submitted nine days before the decree of lack of jurisdiction was affirmed; third, the reference to page 241 of the

Standard Oil decision, which page, as stated above, contains nothing but the discussion of lack of jurisdiction; and fourth, the cited *Brady* case was dismissed for lack of jurisdiction, it is apparent that the Supreme Court decision of the *George Allison* case was purely and only that there was lack of jurisdiction in the District Court because plaintiff had exhausted the statutory election by proceeding for reparations before the Commission.

Without detailing our consideration and interpretation of a number of other cases which plaintiff has cited, it appears abundantly clear to this court that as of June 18, 1945, when the Supreme Court decided the *Ashland Coal* case, it expressly re-iterated and re-affirmed the doctrine that where a shipper sues a carrier before the Commission for reparations, this constitutes an election under Section 9 of the Interstate Commerce Act, which precludes recourse to a District Court either by original action or by appeal from the Commission decision.

Plaintiff's next contention against the vitality of the *Ashland Coal* decision is that, less than a year later, this case was overruled by the Supreme Court in the case of *El Dorado Oil Works v. U. S.*, 328 U. S. 12. If this be true, the overruling was done inferentially, without mention of either the *Ashland Coal* case, any of the cases on which it relies, Section 8 or 9 of the Interstate Commerce Act, or election of remedies for reparations.

It is true that appeals to the District Court are permissible from certain types of Commission rulings, and, in our view, the *El Dorado Oil Works* case is one of these. But, it is clearly distinguishable from the case at bar and from the *Ashland Coal* case. The case at bar involves the application of certain unambiguous tariffs and it and the *Ashland Coal* case are straight Section 8 cases by shipper against carrier, in which each plaintiff exercised its Section 9 election by filing a complaint for reparations before the Commission. Having done so, the wording of Section 9 precludes recourse to a District Court. The *El Dorado Oil Works* litigation originated not as a Section 8 reparation action against a carrier, but as an assumpsit action filed in the state court by a shipper against a non-carrier owner of

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private tank cars. It was removed to the District Court on the basis of diversity of citizenship and amount involved. Defendant had rented these tank cars to plaintiff, for use in shipping oil, under a contract calling for a fixed monthly rental, with the proviso that plaintiff should receive credit for any excess between such fixed rental and the mileage allowance for use of the cars paid to defendant-owner by railroads which transported plaintiff's oil in the cars. When defendant-owner refused to continue crediting plaintiff with the excess because it indirectly constituted an unlawful freight rebate, plaintiff sued defendant-owner to enforce the contract. When the case reached the Supreme Court, it decided that, in view of the statutory policy of enforcing equal rates for all interstate transportation by common carriers, the real issue was, whether plaintiff was paying more or less for transportation of its oil than other shippers, which, in turn, required a determination of what would be a reasonable and just mileage allowance by carriers to shipper-lessees of private tank cars. The Supreme Court then decided that, as carriers could operate only under published tariffs and there was no tariff covering mileage allowance by railroads to private car shipper-lessees, as distinguished from private car owners, and, as the Interstate Commerce Commission has a statutory duty to investigate and to remove any advantage, preference or discrimination in rates or otherwise connected with interstate transportation, it was clearly a case where, before the courts made a determination as between this plaintiff and this defendant, the Commission should perform its exclusive statutory duty to investigate the practice and establish such a tariff, determining what was a reasonable and just rate to be included therein. Thereupon, the Supreme Court remanded the action to the District Court, with orders to stay further proceedings therein until the Commission made such an administrative investigation and determination. See: *Tank Car Corp. v. Terminal Co.*, 308 U. S. 422. After this rate investigation was determined, the District Court proceeded with the assumpsit action and rendered judgment for defendant, which was affirmed. See: *El Dorado Terminal Co. v. American Tank Car Corp.*, 163 F. 2d 428. (C. C. A. 9)

The case which plaintiff says overrules the *Ashland Coal* decision, *El Dorado Oil Works v. U. S.*, 328 U. S. 12, decided April 22, 1946, relates to this separate administrative proceeding instituted before the Commission in accordance with the direction of the Supreme Court in *Tank Car Corp. v. Terminal Co.*, supra. The Commission report of this proceeding, entitled *Allowance for Privately Owned Tank Cars*, 258 I.C.C. 371, relates that a petition was filed with the Commission by the Oil Company and the Terminal Company, its assignee, detailing the case history outlined above and praying that the Commission make an investigation of the practices disclosed therein and enter an order holding the disputed credits from the tank car owner to the shipper-lessee were reasonable and lawful. Following, on page 373, the report reads:

> "Upon consideration of that petition, by our order dated July 24, 1940, we instituted an investigation upon our own motion to determine:
>
> (1) Whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) what findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.
>
> "All common carriers by railroad concurring in Trans-Continental Freight Bureau tariff No. 3-N, I.C.C. 1452 (Agent Kipp issue), naming rates on coconut oil and other commodities from California to eastern points, were made respondents."

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A hearing was held in which all parties participated. The Commission decided that a just and reasonable allowance by carriers to the Oil Works for furnishing such cars would have been an amount not to exceed the fixed monthly rental, which allowance had been paid; that payment of any allowance to the Oil Works in excess of such rental would be unjust, unreasonable and unduly preferential; that the Oil Works was entitled to no allowance for special cleaning and preparation of the tank cars; and the proceeding was discontinued. From this Commission determination, an appeal was taken to the District Court. This was heard as a three-judge case and dismissed for want of jurisdiction, the court holding specifically and only that the Commission's administrative determination was not a final appealable order as it did not finally determine any controversy. See: *El Dorado Oil Works v. U. S.*, 59 F. S. 738 (S.D. Cal.) Upon direct appeal to the Supreme Court, reported in 328 U. S. 12, it held that the Commission's determination did constitute a final and appealable order, within the reviewing jurisdiction of a three-judge District Court and of the Supreme Court, because from the ruling legal consequences would follow which would finally fix a right or obligation. The Supreme Court then reviewed and affirmed this Commission decision on the merits. It is from the Court's statement that the District Court had appellate jurisdiction of this administrative ruling as a final and appealable order that plaintiff in the case at bar argues that the *Ashland Coal* case was inferentially overruled and that this court should disregard the *Ashland Coal* doctrine and assume jurisdiction of this reparation case. In the *El Dorado Oil* case, the subject of a statutory action against a carrier for reparations under Section 8 of the Interstate Commerce Act was not in issue before the court. The subject of an election of statutory remedies for reparations against a carrier under Section 9 was not before the court. Naturally, neither of these two subjects was mentioned or passed upon, either directly, by reference to these sections of the Interstate Commerce Act or to cases such as the *Ashland Coal* case, or indrectly, by any reasonable inference to be drawn from the language used.

Accordingly, it is apparent that the rule announced in the *Ashland Coal* case was neither intended to be, nor was it, affected by the *El Dorado Oil* case, and we are bound by the *Ashland Coal* rule that, under the circumstances here present, plaintiff-shipper has made a binding election by proceeding before the Commission in seeking reparations from carriers, and Section 9 of the Interstate Commerce Act precludes it from now resorting to this court, by appeal or otherwise.

In view of the fact that this court is bound by decisions of the Supreme Court until they are overruled, plaintiff's argument that, if the *Ashland Coal* jurisdictional decision as to reparations cases has not been overruled, it should be reexamined and overruled, is not a matter upon which we are free to act.

This brings us to the next legal proposition relied upon by plaintiff, namely, that, independently of the Urgent Deficiencies Act, the Administrative Procedure Act of 1946 gives it a right to a review by this court of the Commission's ruling denying reparations. The Administrative Procedure Act provides that, "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—(a) any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof." 5 U.S.C.A. 1009. This provision is well analyzed in *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C.C., D.C.). There it is held that where a previous Supreme Court case had decided that the Railway Labor Act precluded judicial review of an administrative agency action, the right to judicial review was unchanged by passage of the Administrative Procedure Act, and that, "the point seems obvious." It likewise seems obvious to this court that, where the Supreme Court has decided in the still vital *Ashland Coal* case that Section 9 of the Interstate Commerce Act precludes judicial review of a Commission decision under the circumstances here present, plaintiff's lack of right to review remained unchanged by passage of the Administrative Procedure Act.

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Accordingly, the complaint will be dismissed for want of jurisdiction.

Dated: December 22, 1948.

CHARLES C. SIMONS,
United States Circuit Judge;
ARTHUR F. LEDERLE,
District Judge;
FRANK A. PICARD.

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